IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 371

LOUIS NASH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE [redacted] DISTRICT COURT OF APPEAL OF FLORIDA THIRD DIST.

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October Term, 1967

No. _____

LOUIS NASH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

LOUIS NASH, Petitioner herein, by and through his undersigned attorney, respectfully prays that this Honorable Court issue its Writ of Certiorari to review the opinion and judgment of the District Court of Appeal of Florida, Third District, dated June 28, 1966; the order of the Supreme Court of Florida denying certiorari entered on the 31st day of January, 1967, and the order of the same Court of the 8th day of March, 1967, denying Petition for Rehearing.

OPINIONS OF THE COURT BELOW

The opinion and judgment of the District Court of

Appeal, Third District, entered June 28, 1966, is reported in 188 So.2d, page 391, and reported as **Louis Nash, Appellant v. The State of Florida, Appellee.** A copy is attached as APPENDIX A.

The Order of the Supreme Court of Florida denying Certiorari was entered on the 31st day of January, 1967. A copy is attached as APPENDIX B.

The Order denying petition for rehearing was entered by the Supreme Court of Florida on the 8th day of March, 1967. A copy is attached as APPENDIX C.

Mr. Justice William J. Brennan, Jr. extended the time for filing Petition for Writ of Certiorari to and including July 15, 1967.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 USC Sec 1257(3).

QUESTIONS PRESENTED

I

WHETHER A DENIAL OF DUE PROCESS RESULTED FROM ADMISSION INTO EVIDENCE OF ALLEGED CO-CONSPIRATORS' PREJUDICIAL STATEMENTS MADE PRIOR TO THE FORMATION AND SUBSEQUENT TO THE TERMINATION OF A CONSPIRACY.

II

WHETHER A DENIAL OF DUE PROCESS OF LAW RESULTED FROM A STATE COURT CONVICTION FOR A CRIMINAL OFFENSE WITHOUT ANY EVIDENCE INDICATING PETITIONER'S PARTICIPATION IN THE CRIME CHARGED.

III

WHETHER A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS WAS EFFECTED BY THE FAILURE TO DISMISS A CONSPIRACY CHARGE WHEN AN APPELLATE COURT REVIEWING THE RECORD FOUND THAT THERE WAS NO EVIDENCE UPON WHICH THE PETITIONER COULD BE FOUND GUILTY OF THE SUBSTANTIVE CHARGE AND WHERE THE SOLE FACT AT ISSUE IN THE SUBSTANTIVE CHARGE WAS IDENTICAL TO THE FACT AT ISSUE IN THE CONSPIRACY CHARGE AS IT PERTAINED TO PETITIONER.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the United States Constitutional Amendment No. 14, Section One, as follows:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT

OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES INVOLVED

The Florida Statutes involved in this petition are Florida Statutes, 1965 ch. 811.021 as follows:

"A person who, with intent to deprive or defraud the true owner of his property or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: (a) takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, per-

> sonal property, goods and chattels, thing in action, evidence or debt, contract, or property, or article of value of any kind, or: (b) having in his possession, custody or control, as a broker, bailee, servant, attorney, agent, employee, clerk, trustee, or officer of any person, association, or corporation, member of co-partnership, pool or joint adventure, or as a person authorized by an agreement, or by competent authority; to hold or take such possession, custody, or control, any money, personal thing or action, goods and chattels, evidence of debt, contract, property, or article of value of any kind, appropriates the same to his own use, or that of any other person, other than the true owner or person entitled to the benefit thereof; . . . . "

and Florida Statutes, 1965, ch. 833.04, recited as follows:

> "If two or more persons shall agree, conspire, combine or confederate to commit any other felony they shall be guilty of a felony and punishable by imprisonment in the state prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the state prison for one year, whichever may be the greater."

STATEMENT OF THE CASE

Petitioner was accused jointly with other co-defendants of a conspiracy to commit grand larceny and of the substantive crime of grand larceny.

He was convicted by a jury on both counts. Petitioner was sentenced to fifteen months on the conspiracy charge. The conviction on the charge of grand larceny was reversed by the Florida District Court of Appeal, Third District, which held that the evidence was insufficient to establish the guilt of Petitioner. The Court held that where circumstantial evidence was relied upon, the evidence must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence. (APPENDIX A).

The salient facts are simple: Nash engaged in discussions with agents concerning the sale to them of liquor. The record discloses without contradiction that the discussions were limited to the sale of "island whisky" or "untaxed whisky". *(TR 10-11, 16-26, 29-31, 43, 48, 50, 52, 70, 71, 77.)

There was not one word of evidence indicating Nash's knowledge that the whisky involved was stolen. At the trial the lengthy confession of a co-defendant, Sherwood Rosen, was presented to the jury. (TR 285, 287, 289, 409; confession, 412, 443, 446, 456, 457, 460). That confession made after the sale had been completed was by definition post-conspiratorial. It contained statements which indicated that the arrangements to steal the whisky had been made long prior to the time that Petitioner-Nash had any part in the proceedings. That phase of the confession was, therefore, inadmissible as having been made after the formation of the conspiracy, if there had been one, and also because it discussed events which had taken place prior to any participation by Nash.

*TR represents pages in the transcript of testimony which are part of the record on appeal.

Another confession, prejudicial to Petitioner, post-conspiratorial in nature, was admitted in evidence. That confession was coerced. It is the subject matter of a Petition for Writ of Certiorari presently pending in this court under the style of:

Malcolm Roberts, Petitioner
v.
The State of Florida, Respondent.

No evidence of any kind, whether by way of confession or otherwise, denies the following:

a) Rosen and Shay had arranged the theft of liquor with discussions that began long before any conversation was had with Nash, or anyone else.

b) The arrangement to steal was completed and the theft was completed without Nash.

c) Nash did not know Rosen or Roberts.

d) No one stated or inferred that Nash knew the whisky involved was stolen.

e) Nash's only participation was in arranging for the sale of the whisky to others, after arranging to buy it from Shay.

Petitioner concedes that the record discloses that Nash was involved in the ultimate second sale to third parties.

The only material fact at issue is whether or not Nash knew of and participated in the theft. He was not charged with illegal sale of whisky.

The Federal questions presented by this Petition were originally raised in the trial court. They were raised by objections to the introduction of confessions and statements of alleged co-conspirators on the grounds that Federal and Constitutional rights, and in particular the Sixth and Fourteenth Amendments were being violated. Additional specific objections to the introduction of coerced confessions were raised at the trial (TR 639-641).

The Court permitted the introduction into evidence of the confessions (TR 644). The Federal questions were also raised by motion to strike (TR 567).

The motion was denied (TR 570). The confession itself disclosed Roberts participation in the crime charged (TR 646-654).

REASONS FOR GRANTING THE WRIT

This Court has been particularly sensitive to the dangers of prejudice and deprivation of a fair trial caused by preconspiratorial and post-conspiratorial hearsay statements implicating another co-conspirator when unaccompanied by a proper cautionary instruction. **Delli Paoli v. U. S. 352 U.S. 232 (1957); Fiswick v. U. S. 329 U.S. 211 (1946); Krulewitch v. U. S. 336 U.S. 440 (1949); Wong Sun v. U. S. 371 U.S. 471 (1963).**

The charge of the Court to the jury when read as a whole (APPENDIX E) discloses that the jury was not

sufficiently advised that statements by co-defendants and actions of co-defendants were not to be considered at all with reference to the Petitioner unless and until the jury determined that a conspiracy in fact existed and that the conspiracy involved the theft and not just the sale of whisky. No one contended that Nash was directly involved in the theft. No one denied that Nash was directly involved in the sale. Since the liquor was in fact stolen as reflected by the Record, Nash could only be found guilty of conspiracy to commit larceny if he participated in the **theft** and not just the **sale.** He could only have been convicted of conspiracy to commit the theft if he knew the whisky was to be stolen. In the absence of direct testimony, that fact would have to be shown with no reasonable contrary hypothesis. There is no other single fact that would **link** him as a participant in the conspiracy to commit larceny or **deny** his participation in the conspiracy to commit larceny.

Petitioner readily concedes that inconsistent findings are possible on different counts in most criminal proceedings, but, in this case, when the District Court of Appeal, Third District, and not the jury found that there was no sufficient evidence to link him with the theft, that Court necessarily found that the single fact of knowledge of the theft was absent. In this case, therefore, there can be no evidence existing in the record that could link Petitioner to the conspiracy to commit the theft.

In **Shuttlesworth v. Birmingham, 382 US 87, 15 L ed 2d 176 86 S Ct 211,** this Court held that a conviction violates due process when there is no evidence whatever in the record to support it. The reversal of the substantive

count by the District Court of Appeal of Florida, Third District, is based on a finding that there is no evidence whatsoever in the record to support the conviction. Such conclusion necessarily flows from the fact that the Appellate Court struck down the finding of the jury. See also **Thompson v. City of Louisville, 362 U.S. 199, 4 L Ed 2d 654, 80 SC 624, 80 ARL 2d 1355.**

As this Court stated in Shuttlesworth v. Birmingham, supra:

> "The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 US at 199, 4 L ed 2d at 655, 80 ALR 2d 1355. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt."

The record absent the post conspiratorial statements of Rosen and Roberts could not even inferentially point to a knowledge by Petitioner that the whisky involved was to be stolen. The potential prejudicial effect of such post-conspiratorial evidence has impelled other courts, both before and after **Delli Paoli**, supra, to reverse convictions. See **eg. Schaffer v. U. S. 221 Fed. 2d 17 (5th Cir.**

1955); Barton v. U. S. 263 Fed 2d 894 (5th Cir. 1959); Abbate v. U. S. 247 Fed. 2d 410 (5th Cir. 1957); Mora v. U. S. 190 Fed. 2d 749 (5th Cir. 1951); U. S. v. Jacangello 281 Fed. 2d 574 (3rd Cir. 1960); U. S. v. Gordon 253 Fed. 2d 177 (7th Cir. 1958); Tripp v. U. S. 295 Fed. 2d 418 (10th Cir. 1961); Kramer v. U.S. 317 Fed. 2d 114 (D.C. Cir. 1963); U. S. v. Sansone 206 Fed. 2d 86 (2d Cir. 1953).

Petitioner urges the further invalidity of the Roberts post-conspiratorial confession as involved with such coercion as to prohibit its sanction in any court. Its effect was not only prejudicial upon Roberts but must of necessity have spilled over in the minds of the jury to Petitioner. See Mapp v. Ohio, 367 U.S. 643, 6 L ed 2d 1081, 81 S Ct. 1684, and cases cited therein.

CONCLUSION

Obviously, without either confession presented to the jury the only evidence, by inference or otherwise, concerning Petitioner, would be his participation in a sale of whisky, apparently untaxed, to third persons. It is impossible to determine, however, that "spill over" effect hearing the confessions of two other persons charged with the crime of grand larceny would have had upon the jury. It would not even matter whether Petitioner knew the liquor was stolen since the crime charged was not the sale of stolen whisky, but the commission of the grand larceny itself.

Bringing these people to court as co-defendants, and permitting the jury to hear two confessions of the crime of stealing the whisky, would certainly have had some effect upon the preconditioning of the jury in deciding

whether Nash also participated in the theft, although not one word of evidence indicates his participation in anything but the sale.

This record discloses no basis whatsoever for a conspiracy count when the identical jury charge, in toto, levied in the substantive count. This view is borne out by its reversal based on the identical fact.

For the foregoing reasons, Petitioner respectfully urges this Petition for Writ of Certiorari be granted.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida 33139

APPENDIX A

District Court of Appeal of Florida
Third District

No. 65-506

LOUIS NASH, Appellant,

-v-

The State of Florida, Appellee.

"Per Curiam. The appellant was informed against, tried before a jury and found guilty of conspiracy to commit grand larceny and grand larceny. The sentences are fifteen months in the State penitentiary on the conspiracy to commit grand larceny and five years on the grand larceny, the sentences to run concurrently.

On this appeal, the appellant raises three points. The first point questions the sufficiency of the evidence to support the conviction of conspiracy to commit grand larceny. The second point questions the sufficiency of the evidence to support the conviction for grand larceny. The third point questions the sufficiency of the evidence as to both counts because of the claimed failure of the State to prove lack of consent on the part of the owner of the property which was stolen.

The facts are extremely lengthy and complicated. The testimony covers almost 1000 pages. We think that it is unnecessary to give a detailed statement of the evidence noted to determine this appeal. In general, it may be said that the evidence showed an attempt by the State Beverage Department, acting through its agents and cooperating conspirators, to purchase unlicensed "island" whiskey. The purpose of this effort was to discover the

source of untaxed whiskey which the agents knew was being brought into this State from the nearby islands.

In carrying out their plan, the agents were put in contact with the appellant Nash. Acting through him and others the agents discovered that they were able to purchase a truck load of whiskey which was not only untaxed but also stolen.

(1) There is sufficient evidence in this record to convince a jury that appellant Nash was a party to the conspiracy, and that he knew that the whiskey was to be stolen. There is also evidence which would support a finding by the jury that, after the crime was accomplished, Nash assisted in the delivery of the whiskey to the purchasers, who were actually agents but were not known by appellant to be such. We therefore reach the conclusion that the conviction upon the count charging conspiracy to commit grand larceny must be affirmed. See Pine v. United States, 135 F. 2d 353 (5th Cir. 1943); 15 C.J.S. Conspiracy § 39).

(2)(3) A consideration of the evidence upon the charge of grand larceny reveals that it is insufficient to establish the guilt of the appellant Nash. It is well established that where circumstantial evidence is relied upon for proof of guilt, such evidence must be not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence. State v. Trafficante, Fla. App. 1961, 136 So. 2d 264; Ricard v. State, Fla. App. 1966, 181 So. 2d 677.

(4) The State suggests that, because some of the physical evidence of the crime of larceny was not

brought to this Court, we are precluded from a determination of the sufficiency of the evidence to support the conviction of this appellant. A reading of the record convinces us that none of the physical evidence would have been relevent to the actions of this appellant to tend to show his participation in the crime of grand larceny.

The judgment and sentence of the appellant Louis Nash for the crime of conspiracy to commit grand larceny is affirmed. The Judgment and sentence of appellant Louis Nash for the crime of grand larceny is reversed and he is discharged therefrom.

Affirmed in part and reversed in part."

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1967

Tuesday, January 31, 1967

Case No. 35,596

LOUIS NASH, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

This cause having heretofore been submitted to the Court on Petition and Cross-Petition for Writs of Cer-

tiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date June 28, 1966, and the record having been inspected, it is ordered that said Petition and Cross-Petition be and the same is hereby denied.

THORNAL, C.J., THOMAS, ROBERTS, DREW, O'CONNELL, CALDWELL and ERVIN, JJ., concur to the denial of the Petition for Certiorari

THORNAL, C.J., THOMAS, DREW and CALDWELL, JJ., concur to the denial of the Cross-Petition for Certiorari

ROBERTS, O'CONNELL and ERVIN, JJ., dissent to the denial of the Cross-Petition for Certiorari

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

cc: Honorable W. P. Carter
Honorable J. F. McCracken
Honorable Max B. Kogen
Honorable James T. Carlisle

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

January Term A.D. 1967

Wednesday, March 8, A.D. 1967

Case No. 35,596

LOUIS NASH, Petitioner

-vs-

STATE OF FLORIDA, Respondent

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
Clerk Supreme Court

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JANUARY 31, 1967, IN THE ABOVE CAUSE)

APPENDIX D

AMENDMENT XVI. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

CHARGE TO JURY

THE COURT: Gentlemen of the jury, you have heard and considered the testimony and other evidence in this case and the arguments of counsel. It now becomes my duty to give you certain instructions as to the law which you are to apply to the facts as you find them from the evidence.

It is on this evidence and this alone that you are

to try the defendants. Under your oaths as jurors, you are calmly, fairly, and dispassionately to consider the testimony and other evidence in this case and the law as charged to you by the Court and from such evidence and law, and those matters only, arrive at your verdict. It is your province and duty to pass upon and to decide the disputed issues of fact. It is the Court's province and duty, however, to give you the law which you are to apply to those facts. You are not to be swayed in the performance of this duty by prejudice, sympathy, or any other sentiment, but you must try the case fairly and impartially on the evidence.

However, in the consideration of such testimony and evidence, you will bring to bear in your consideration in addition, all of that common knowledge of men and affairs which you, as reasonable men have and exercise in the everyday affairs of life.

There has been filed in this Court two Informations that charge the defendants, Louis Nash, Edmund Anthony Petrocine, Sherwood H. Rosen and Malcolm Roberts, together with other named individuals, as the defendants, charging each with in Count No. 1—each Information consists of two counts. No. 1, conspiracy to commit grand larceny, and Count No. 2, being the charge of grand larceny. Let me say right here that other than the defendants who are here before the Court, you are not to concern yourselves in any manner with the names of any other defendants appearing in the Information who are not before the Court. Their status has absolutely no meaning to you, and you are not to be concerned with that at all.

I would like to ask all counsel, do you waive the necessity of reading the Information?

MR. HAFT: Waive the reading.

MR. KOGEN: So waive, but we respectfully ask the Court to delete any other names, other than those who are defendants in this case, for the reason, I assume, that the jurors will be entitled to take the Information in with them.

MR. FERGUSON: To which the State will object.

MR. HAFT: I have no objections.

MR. FERGUSON: All the names should remain on the Information, and nothing should be deleted.

MR. DUNCANSON: May I ask if the jurors — are you going to allow them to take the Informations with them?

THE COURT: Yes.

MR. DUNCANSON: Then I will waive.

THE COURT: With that stipulation, the necessity of the Court reading the Information — I will not read it in detail, and I will further instruct you at the time that you go into the jury room that you have someone read it.

MR. FERGUSON: Has your Honor ruled on Mr. Kogen's request?

THE COURT: I am going to overrule the objection.

MR. FERGUSON: That you, sir.

THE COURT: To the Informations the defendants have each entered a plea of not guilty — to each count of each Information — which makes up the issues which you are to try. The State by the Information is charging the accused, and the defendants by their plea of not guilty are denying every material allegation of such Informations.

The Informations themselves are not evidence, but a mere formal accusation of the defendants. You are not to consider them as evidence of the defendants' guilt, and you shall not permit yourselves to be influenced by the fact that an Information has been filed against the defendants.

The Statutes under which these defendants are charged with having violated are Section 811.021 of the Florida Statutes, which is entitled, "Larceny, defined, penalties, sufficiency of indictment and information or warrant." It reads as follows:

> "A person who, with intent to deprive or defraud the true owner of his property or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: A, takes from the possession of the true owner, or of any other person, or obtains from such person possession by color or aid of fraudulent or false representations or pretence, or of any false token or writings, or obtains the signature of

any person to a written instrument, the false making whereof would be punishable as perjury, or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, goods and chattels, thing in action, evidence of debt, contract, or property, or article of value of any kind, or: B, having in his possession, custody or control, as a broker, bailee, servant, attorney, agent, employee, clerk, trustee, or officer of any person, association, or corporation, member of co-partnership, pool or joint adventure, or as a person authorized by an agreement, or by competent authority, to hold or take such possession, custody or control, any money, personal thing or action, goods and chattels, evidence of debt, contract, property, or article of value of any kind, appropriates the same to his own use, or that of any other person, other than the true owner or person entitled to the benefit thereof, or C,—

Let me interrupt at this point to ask—C Section pertains to—

MR. KOGEN: Waive that as not being applicable.

THE COURT: That is for all defendants?

MR. HAFT: Right.

MR. DUNCANSON: Yes.

MR. SEPE: No objection.

THE COURT: We will omit Section C, and then in paragraph numbered 2 of that section:

> "If the property stolen is of the value of $100.00 or more, the offender shall be deemed guilty of grand larceny, and upon conviction thereof shall be punished by imprisonment in the State Penitentiary not exceeding five years, or in the County Jail not exceeding twelve months, or by fine not exceeding $1,000.00.
>
> "3, if the value of the property stolen as mentioned in the preceding section is less than $100.00, the offender shall be deemed guilty of petty (sic) larceny, and upon conviction, shall be punished by imprisonment in the County Jail not exceeding six months or by fine not exceeding $300.00.
>
> "4, hereafter it shall not be a defense to a prosecution for larceny or for an attempt or for conspiracy to commit the same or for being an accessory thereto if the purpose for which the owner was induced by color of aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof was illegal, immoral or unworthy."

Paragraph 5 goes to sufficiency of the indictment and information and paragraph 6—can we waive the necessity of reading that?

MR. HAFT: Yes.

MR. KOGEN: Yes, sir.

MR. DUNCANSON: Yes.

THE COURT: Those paragraphs I will not read from 811.021 of the Florida Statutes.

That is the Statute which the defendants are charged under in Count No. 2 of the Information with violating, and Count No. 1 of the Information is allegedly a violation of Section 833.01 of the Florida Statutes, entitled, "Conspiracy."

> "If two or more persons shall agree, conspire, combine or confederate, one, to commit any offense two, falsely —"

These defendants are charged under Sections 833.04 of the Florida Statutes. I will not read Section 833.01 of the Statutes at all.

Section 833.04 is entitled, "Conspiracy to commit other felony, other than a capital offense," or a felony which is punishable by imprisonment for life.

> "If two or more persons shall agree, conspire, combine or confederate to commit any other felony other than those punishable by death or imprisonment, they shall be guilty of a felony and punishable by imprisonment in the State Prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the

State Prison for one year, whichever may be the greater."

Those are the two Statutes which the defendants are charged with violating.

MR. FERGUSON: May we step forward before before you a minute, sir?

THE COURT: All right.

(Informal discussion off the record.)

MR. KOGEN: I will waive that.

MR. FERGUSON: No.

THE COURT: I will say then, if I did not — let me just say in defining this "Or any other felony, other than a felony punishable by death or imprisonment for life —" it seems I left off the, "Imprisonment for life." This Section here becomes material only because it is relating to those other felonies. I think what I had better do is read the entire section once more through.

Section 833.04 of the Florida Statutes is what I am reading now.

"If two or more persons shall agree, conspire, combine or confederate to commit any other felony —"

Meaning any felony other than those punishable by death or imprisonment for life.

> "— shall be guilty of a felony and punishable by imprisonment in the State prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the State Prison for one year, whichever may be the greater."

Those are the Florida Statutes under which the defendants are charged.

Notwithstanding these Informations, the defendants on trial, as do all defendants in criminal cases, come into this Court clothed with the presumption of innocence, which remains and abides with them throughout the trial, unless and until the State has, by competent evidence, convinced the mind of each individual juror of the guilt of the accused beyond a reasonable doubt.

The burden of proof is upon the State to prove all of the material allegations in the Informations beyond a reasonable doubt, and if the State does that, it is your duty as jurors, under your oaths, to find the defendants guilty, but if the State fails to do that, then under your oaths as jurors, you are to give the defendants the benefit of any reasonable doubt and acquit them.

By reasonable doubt is meant a real doubt arising from the evidence or lack of evidence in the case, and not a mere fanciful or imaginary doubt, but one for which you can give your minds and consciences a satisfactory reason after considering all of the facts and circumstances of the case. It is that stage of the case, which

after a consideration of the entire testimony the jurors' minds are in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

You are the sole and exclusive judges of the evidence and of the credibility of the witnesses. It is your duty, if you can do so, to reconcile any conflicting testimony as to make all of the witnesses speak the truth. If you cannot do so, it is your duty to determine which witness has spoken the truth. In determining the credibility of a witness, it is proper that you take into consideration the manner of the witness on the Stand, his candor or want of candor, his intelligence or otherwise, the reasonableness or unreasonableness of his testimony, his interest, if any he has, in the outcome of the case, the means and opportunity of the witness for knowing the facts about which he has testified, and all of the other circumstances surrounding such witness at the time of the giving of his testimony and at the time of the happening of the events about which he has testified.

Now, it has been observed by the jury that the defendants did not take the Stand in their own defense; that is a fact of passing interest only. The failure of the defendant to testify in his own behalf, has no evidenciary significance, and no unfavorable inference should be drawn from such failure. It is strictly a defendant's privilege to testify or not to testify if he likes. These defendants entered this trial with a presumption of innocence in their favor, and it was not their obligation to sustain this presumption. It was the prosecution's duty to overthrow it in order to warrant the finding of guilt.

There has been presented to you certain confessions or statements of the defendants in this case. The confession or statement made by a principal or an aider and abettor may be introduced by the prosecution as a part of the State's case, but you are instructed that you must consider the confession or statement only in connection with the guilt or innocence of the defendant who gave or made the same, and that you must not consider it in connection with the guilt or innocence of other defendants.

I further instruct you that where there are two or more persons charged in the same count of the Information with committing a felony of grand larceny, as principal in the first degree, it is permissible to show that one of the persons charged actually committed the felony of grand larceny and that the other person or persons were present aiding and abetting the commission of such felony of grand larceny, and they may be convicted under such charge and proof. Both or all are equally guilty, and it is not material as to which one is alleged to have actually committed the felony of grand larceny if it is duly proven that one committed the act and the other or others were present aiding and abetting the alleged felony of grand larceny.

I would further charge you, that if a person aids and abets another in the commission of a crime, he is as guilty as the party who commits that crime and is thus aided and abetted by him. The words aid and abet comprehend all assistance rendered by acts, words, encouragement, support or presence, actual or constructive to render assistance should it become necessary.

You are further instructed that if several persons combine together to commit the unlawful act of grand larceny, he is criminally responsible for the acts his associates committed in furtherance or prosecution of the common design; and if several persons combine to do the unlawful act of grand larceny, in the perpetration of the acts all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act of grand larceny they set out to accomplish.

Where two or more persons, acting with a common intent, jointly engage in the same undertaking and jointly commit the unlawful act of grand larceny, each is chargeable with liability and responsibility for the acts of all the others, each being guilty of the offense committed, to which he has contributed to the same extent as if he were the sole offender.

The Court instructs the jury that, "Conspiracy," as used in these instructions is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose.

The Court instructs the jury that by the term, "Common design," is meant community of intention between two or more persons to do an unlawful act, and it may be established by circumstances or by direct evidence of an expressed agreement, but before the conspiracy can be established by circumstances, the facts and circumstances tending to show such common design, conspiracy and the connection of the defendant therewith, must be established beyond a reasonable doubt by the evidence in the case, and when so established, such facts and circum-

stances must not only be consistent with each other and with the defendant's guilty connection therewith, but also absolutely inconsistent with any other reasonable theory.

Gentlemen, you are instructed that whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such an offense.

I would further instruct you that a conspirator is not criminally liable for every incidental result arising from the acts of the co-conspirators, but only for such as could have reasonably been foreseen.

I would further instruct you that in order to find any defendant guilty of the charge of conspiracy, his act or acts, as shown by the evidence adduced by the prosecution, must be a part of the ordinary and probable effect of the wrongful act agreed upon so that the connection between the act or acts of the defendants and the wrongful acts may be reasonably apparent. The wrongful act may not be a fresh and independent product of the mind of one of the confederates outside of and foreign to the common design. In other words, the act or acts of any conspirator must be directly related to the wrongful purpose in this case, the larceny of whiskey.

While the participation in a conspiracy by any defendant need not be shown by positive evidence, any inference of his participation must be shown by the

surrounding and accompanying circumstances of, or, in other words, any actions of any defendant must directly be a part of, the crime that is the common purpose of the conspiracy, in this case, the larceny of whiskey.

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty, whether the evidence be direct or positive or circumstantial, it will be your duty to render a verdict of guilty, but in order to convict a defendant on the circumstantial evidence, every essential fact or circumstance to the conclusion of guilt must be proved beyond a reasonable doubt. Such facts and circumstances must also be consistent with each other and must not only be consistent with the defendant's guilt, but must also exclude to a moral certainty every other reasonable supposition, except that of the guilt of the accused.

One who is instigated, induced or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing, may avail himself to the defense of entrapment (sic). Such defense is not available, however, where an officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent.

Entrapment (sic) is recognized as a valid defense, available to a person charged with the commission of a public offense under certain circumstances. It is a positive defense, the invocation of which necessarily assumes that the act charged was committed. Such entrapment (sic) is shown where it appears that officers of the law or their

agents incited, induced, instigated or lured the accused into committing an offense which he otherwise would not have committed, and had no intention of committing. In other words, if the criminal intent or design to commit the offense charged originates in the mind of the person who seeks to entrap the accused and to lure him into the commission of the crime merely for the purpose of arresting and prosecuting him, no conviction may be made. The practice of inducing or instigating the commission of a crime by an otherwise innocent person has been denounced as reprehensible and contrary to sound public policy.

The doctrine of entrapment (sic), however, has a limited application, the basic thought being that officers of the law or any other person shall not incite crime merely to punish the perpretrator (sic). Hence, a distinction has been made between the inducing of an innocent person to do an unlawful act, and the setting of a trap to catch one in the execution of a criminal plan of his own conception, the act of the latter character by any person not being regarded as against public policy, and entrappment (sic) is not available as a defense to a person who has the intent and design to commit a criminal offense, and who in fact does commit the essential act constituting it, merely because an officer of the law or other person in his effort to secure evidence against such person, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetration thereof. In other words, gentlemen, if any person goes to an innocent man and encourages him to commit a criminal act, that this man had no intention of committing except when induced by such person, that is against public policy and no conviction should be had. However, if a man is in the business of violating the law,

and any person induces or encourages or entraps him into committing a crime of the character that he has already been committing, then the defense of entrapment is not available, and if you believe him proven guilty of that beyond a reasonable doubt, you should convict him.

Now, the Defendant Petrocine has raised the defense of entrapment.

Though not looked upon with approbation, government inducement of crime is permitted by the Court primarily on the ground that it is necessary for the detection and prevention of a course of criminal activity which could not be otherwise be prevented. When government inducement is employed to entrap someone not engaged in such course of activity, it has not detected crime, but has merely helped to create it.

If you find from the evidence adduced by the prosecution, that the acts of the prosecution witnesses in contacting the Defendant Petrocine, were not prompted by any evidence, complaint or suspicion that the defendant was engaged in the sale of stolen whiskey, nor that any evidence adduced at the trial would indicate that the Defendant Petrocine was engaged in such a course of conduct, then you must find that the defense of entrapment is valid and the defendant must be found not guilty.

Now, the Court makes no intimation to you as to what has or has not been proved. That is a matter of fact solely within the province of the jury, and the jury is not to consider the various rulings of the Court during the trial as indicating that the Court's opinion of the guilt or innocence of the accused.

Let me simply say to you that there has been numerous objections and motions made throughout this trial by one side or the other — one counsel or the other, and the Court has been called upon — of course, this is the Court's function — to make rulings, either overruling or sustaining the objections or denying or granting certain motions to strike certain portions of the testimony. These are the rulings that I am referring to, and that you make no — draw no implication from the Court's view in making its ruling, and by the same token, you will not penalize any defendant or the State — no one whomsoever — by the fact they made these functions and raised these objections. This is their function to make objections as they think it gives them the right to do, and which they have the right to raise those questions. So you will not penalize anyone by virtue of these legal objections being made.